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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 27, 1993

Mr. William F. Caton
 Acting Secretary - Stop Code 1170
 Federal Communications Commission
 1919 M Street, Room 222
 Washington, DC 20554

Re: MM Docket 93-191, RM 8088

Dear Mr. Caton:

Transmitted herewith on behalf of Pikes Peak Broadcasting Company, are an original and four copies of its "Reply Comments" in the above-referenced proceeding.

Should any questions arise concerning this matter, kindly communicate directly with the undersigned.

Very truly yours,

Kathleen Victory
 Kathleen Victory

Enclosures

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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SEP 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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| In the Matter of |) | |
| |) | |
| Amendment of Section 73.606(b), |) | MM Docket 93-191 |
| Table of Allotments, |) | RM-8088 |
| TV Broadcast Stations. |) | |
| (Pueblo, Colorado) |) | |
| |) | |
| To: Chief, Allocations Branch |) | |

REPLY COMMENTS OF PIKES PEAK BROADCASTING COMPANY

Pikes Peak Broadcasting Company ("Pikes Peak"), licensee of Stations KRDO-TV, Colorado Springs, Colorado, and KJCT-TV, Grand Junction, Colorado, by its attorneys and pursuant to the Commission's July 13, 1993 Notice of Proposed Rule Making, DA 93-742 ("NPRM"), submits the following reply comments in the above-captioned proceeding.¹

1. As an initial matter, the University of Southern Colorado ("University") and Sangre de Cristo Communications, Inc. ("SCC") (collectively the "Petitioners") flatly state that they do not intend to pursue the proposed exchange if it is approved pursuant to the terms set forth in the NPRM, i.e., absent the Cheyenne Mountain CP.² As indicated in the NPRM (and as acknowledged by the

¹ Although the NPRM required the filing of reply comments on or before September 20, 1993, Pikes Peak submits its reply comments today pursuant to a request by SCC for a one week extension of time to file reply comments.

² The Petitioners restate their intention to go forward with the exchange only upon the terms of their Request for Issuance of Notice of Proposed Rule Making to Change Channels (the "Joint Petition"). Joint Comments of the University of Southern Colorado and Sangre de Cristo Communications, Inc. ("Joint Comments" or "Jt. Com."), p. 3.

Petitioners in their Joint Comments), proponents of a rule making are required to confirm their intention to go forward with the action proposed in the NPRM³ and failure to do so can result in a denial of the proposal. NPRM, ¶13; appendix ¶2. On this basis alone, the proposed facilities exchange should be dismissed.

2. Petitioners' argument that the public interest benefits, if any, arising from the facilities exchange are "inextricably linked" with the exchange of the Cheyenne Mountain CP (Jt. Com., p.3, n.3) is without foundation. That argument clearly demonstrates that Petitioners', in fact, consider the exchange solely from the perspective of the benefit to accrue to SCC -- not to University and not to the public. However, as established in the Report and Order adopting the exchange policy, the primary purpose of the policy is to "enable noncommercial educational stations to improve service to their audiences." Report and Order in the Matter of Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations, 59 RR 2d 1455, 1464 (1986) ("Exchange Policy Order").

3. Thus, the appropriate consideration is what benefits arise as a result of the exchange that would not accrue if the exchange were denied. Without the requested exchange (and assuming, arguendo, that the Cheyenne Mountain CP is reinstated and that University is financially qualified to construct and operate from that site) University would construct its new transmitting facilities at Cheyenne Mountain from which it could provide a substantially improved signal to Colorado Springs. This would be

³ In this case, the action proposed is the amendment of the TV Table of Allocations to exchange channels and to reserve Channel *8 and reserve Channel 5 at Pueblo, Colorado, and to exchange Petitioners' current licensed facilities.

done without a translator and would allow University to continue providing service to Pueblo, its city of license. With or without the exchange, University will provide service to western Colorado via existing and four requested additional translators it has already independently committed itself to build. On the other hand, if the exchange is approved, University simply will continue to broadcast the same service it currently provides from Baculite Mesa and rebroadcast its signal to Colorado Springs via translator. It will also continue to provide service to western Colorado (with some expansion via additional translators not involved in the exchange). For maintaining the status quo, University will receive a payoff from SCC.⁴ Thus, although the object of the exchange policy is improved noncommercial coverage, the only benefit to University arising from the exchange is monetary. University can only improve its coverage by not accepting the exchange and by operating from Cheyenne Mountain. In short, the public interest does not support the exchange.⁵

4. Petitioners' argue that the Commission already determined that the public interest supported grant of the short-spaced Cheyenne Mountain site and that it is irrelevant whether the programming aired from the site is commercial or noncommercial, is nonsense. Petitioners characterize the extraordinary short-

⁴ This payoff is not clear. SCC will pay University \$150,000. Thereafter University will depend on the interest accruing from an "endowment" to produce approximately \$50,000 per year. University will not have the one million dollars touted by the Petitioners, but only \$150,000 plus \$50,000 or less per year for programming. See statement of Gregory Sinn attached to the exchange petition as Exhibit 1.

⁵ If the public interest is maximized by the proposed exchange with University remaining at its present transmitter site, rather than by University's move to the Cheyenne Mountain site, then there is no basis for the continuation of the Cheyenne Mountain CP.

spacing waiver granted to University as purely technical and argue that University's status as a noncommercial entity was irrelevant to the grant.⁶ Review of the staff's letter granting the short-spacing waiver alone establishes the fallacy of such a claim. See Letter to University from Barbara Kreisman, 8940-MLB, dated February 28, 1991 ("Letter Grant"). In the Letter Grant, the staff expressly cited the "unique role" of noncommercial educational stations in providing coverage to broad service areas.⁷ In light of the fact that the Petitioners' are relying upon a policy expressly created to provide special treatment of noncommercial licensees to support the expansion of noncommercial educational service, it is absurd to argue that the Commission did not, does not and cannot take noncommercial status into consideration in formulating decisions. Thus, while upgrading SCC's service outside its community of license (*i.e.*, Pueblo) may be a private benefit to SCC, it is not a public interest justification for a short-spacing waiver or the proposed exchange. Moreover, expanding its coverage beyond its community of license is not something which SCC is entitled to do in contravention (or via manipulation) of the Commission's rules.

5. Petitioners' argument further fails to consider the fact that, absent some very strong, overriding public interest basis,

⁶ Petitioners' argue that the waiver was granted on the technical basis that no actual interference would occur to any other station or allocation. This argument, however, directly contradicts with Petitioners' claims in their "Joint Petition to Deny" the application of the Central Wyoming College for a new noncommercial facility at Laramie, Wyoming, that the proposed Laramie facility would be short-spaced to University's Cheyenne Mountain CP.

⁷ For this very reason Pikes Peak did not oppose the application even though the proposal was substantially short-spaced with Pikes Peak's station KJCT(TV), Grand Junction, Colorado.

the Commission does not make short-spaced allocations.⁸ Thus, all other factors being equal, while the expansion of noncommercial service provided the necessary public interest justification for University's Cheyenne Mountain grant, no such public interest justification exists for granting the short-spaced site to SCC.

6. Petitioners' argument that University's delay in constructing the Cheyenne Mountain site was due to circumstances beyond University's control is disingenuous at best. The Petitioners admit that no construction was conducted by University but state that it was because "[i]t made no rational or business sense to pursue implementation of a permit which, if the swap were approved, would ultimately be SCC's responsibility." Jt. Com., p. 11.⁹ Petitioners nonetheless contend that the pendency of the exchange proposal was a circumstance beyond University's control.¹⁰

7. The Petitioners also argue that but for the Pikes Peak and KKTV challenges to the Cheyenne Mountain CP extension and the illegal K15BX CP and STA, the facilities exchange proposal would have been granted before the expiration of the Cheyenne Mountain CP

⁸ SCC was obviously aware that it lacked adequate justification for the necessary short-spacing waiver for a site on Cheyenne Mountain since it never attempted this option with its licensed facilities. It did attempt, however, to buy the CP of an unbuilt station which had a site on Cheyenne Mountain -- a ploy which the Commission soundly rejected. See, tvUSA/Pueblo, Ltd., 4 FCC Rcd 598 (M.M.B. 1989), affd. tvUSA/Pueblo Ltd., 5 FCC Rcd 7437 (1990).

⁹ This claim contradicts with University's representations in its recently filed "Supplement to Application for Extension of Permit" where it indicated that its failure to construct resulted from the fact that construction of the tower on which plans to locate its antenna was not timely completed.

¹⁰ Petitioners' attempt to distinguish New Dawn Broadcasting, 2 FCC Rcd 4383 (1987) is unavailing. The Commission itself stated in the NPRM that the pendency of this rule making proceeding did not alleviate University's obligation to timely construct at the Cheyenne Mountain site. NPRM, n. 4.

on February 28, 1993. This argument ignores the fact that the challenges made to the noted authorizations were, and are, legitimate matters which had to be decided by the Commission before any final action on the exchange could be made. Second, University affirmatively elected to pursue the exchange proposal and not to construct during the pendency of the proposal even though the construction could have been used by SCC in the unlikely event that Petitioners' exchange proposal was approved by the Commission. A business judgement, whether or not prudent, is not a circumstance beyond University's control but is a cognitive decision.¹¹ Counsel for Petitioners cannot expect the Commission to believe such a statement. Practically speaking, it takes the Commission at least nine months after the issuance of an NPRM to act on the proposal described in the NPRM.¹² The exchange proposal was filed with the Commission on September 8, 1992, less than six months prior to the expiration of the Cheyenne Mountain CP.¹³ That University could not have expected that final Commission action on the exchange proposal, even unopposed, would occur before the expiration of the

¹¹ Petitioners also argue that University was not required to comply with the requirements of Section 73.3534 since University is not a new station and thus the public is not deprived of any service as a result of the delay in implementation of service. If the Commission intended such a far fetched exception to the enumerated acceptable bases for a permittee's failure to construct, it certainly would have stated it. The Commission's purpose in adopting the Section 73.3534 requirements, as acknowledged by Petitioners, was to ensure that authorizations were awarded to entities willing and capable of timely providing the service or modified service the Commission found to be in the public interest. Voluntary decisions not to construct and provide authorized service do not fall within this scheme.

¹² This, of course, does not include the period of time between the filing by the proponents of a rulemaking proposal and the issuance of an NPRM.

¹³ It is undisputed that, no construction had commenced as of the time the exchange proposal was filed -- more than 18 months after the CP was granted.

CP is to state the obvious.

8. Petitioners' sole excuse for failing to construct is that it would have been unreasonable for University to build a facility at a site which was to be taken over by SCC under the exchange. This ignores the fact that University had an obligation under the Commission's rules to construct. Moreover, University had no guarantee that the exchange would be granted. Indeed, if University had constructed, then University would have its improved facility ready, waiting and perhaps in operation. No credible explanation has been provided by University for failing to timely construct at the new site. In fact, the only explanation that makes any sense is that University decided not to construct and operate from the site for the reason that it is not financially capable of doing so. Since that is the case, the CP should be canceled.¹⁴

9. Petitioners' arrogantly claim that the channel exchange policy "demands" that the Cheyenne Mountain CP be exchanged along with Petitioners' channels. Not so! In stating that the policy is not limited to licensees, but extends to permittees as well, the Commission referred to permittees of unbuilt noncommercial stations exchanging channels with a commercial facility in order to maximize noncommercial coverage or, in extreme cases, to allow the noncommercial permittee to use the monetary consideration flowing from the exchange to construct the facility and **commence** operation to the public. There is nothing in the Exchange Policy Order, nor any authority cited by the Petitioners, to indicate that the

¹⁴ University's commitment to construct at the Cheyenne Mountain site, like SCC's commitment to go forward with the exchange, at best, is contingent. Such contingent commitments are not acceptable.

Commission intended to allow an operating noncommercial licensee to exchange an unbuilt, expired CP granted only as the result of an extraordinary short-spacing waiver, as part of the exchange. The exchange policy allows a noncommercial station to exchange channels with a commercial station.

10. To argue that the exchange policy "demands" that the Cheyenne Mountain CP be exchanged necessarily ignores the Commission's paramount consideration of the public interest. That the public interest does not favor the manipulation of the Commission's rules, the violation of the short-spacing rules or the distortion of legitimate means to obtain illegitimate ends is without question. No showing has been made that the public interest "demands" that a commercial facility be given (without evaluation and application of the Commission's rules) a short-spaced site to facilitate a channel exchange. In fact, in granting one of the exchanges cited by the Petitioners, Amendment of Section 73.606(b) (Clermont and Cocoa, Florida), 4 FCC Rcd 8320, 8322 n. 5 (1989), the Commission expressly noted that before the preferred site the commercial proponent sought to obtain as part of the exchange could be used, the commercial facility would be required to file, and the Commission to consider and grant, a minor modification application to specify the new site.

11. Petitioners' fail substantively to address the Commission's concern regarding the public interest benefit of relying upon translators as the sole means of improving the noncommercial service provided by the exchange proposal. Instead, the Petitioners argue that use of translators has always been a part of University's service and that University's licensed primary facility provides a Grade A signal to Colorado Springs.

Petitioners neglect to address the dichotomy between University's representations in the Cheyenne Mountain application (i.e. that operation of its main transmitting facility from the short-spaced Cheyenne Mountain site was the only means to provide an adequate signal to Colorado Springs) and its current willingness to revert back to service less optimal than that which it averred was absolutely necessary in its the Cheyenne Mountain proposal.

12. While the Petitioners state that University would not do anything that would downgrade service to Colorado Springs, this claim does not mesh with the exchange proposal. Since operation of KTSC from Cheyenne Mountain was the optimal means of providing service to Colorado Springs, service from its existing Baculite Mesa site cannot be anything but a degradation of its expected service to Colorado Springs.¹⁵ The exchange policy was intended to allow improved and expanded noncommercial service, not a continuation of the existing service even where a payoff was involved. Finally, since University filed for the four translators on the Western Slope independent of the proposed exchange and has indicated that it is not relying upon the monetary consideration it might receive from SCC as a result of the exchange to construct and operate the translators, expanded coverage via these translators cannot be considered a benefit resulting from the exchange.

CONCLUSION

The Petitioners failed to destroy the exchange proposed by the

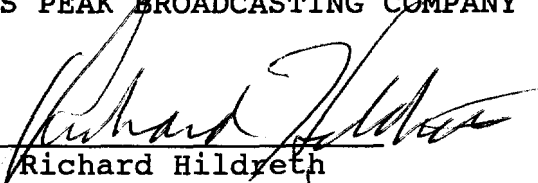
¹⁵ The reference to the use of a translator at Colorado Springs to remedy this decrease in potential service is puzzling. University already operates K15BX serving Colorado Springs from Cheyenne Mountain. If this translator service alleviated University's problem of service to Colorado Springs, then the Cheyenne Mountain CP and the short-spacing waiver were totally unnecessary. The CP should not be extended nor made a part of the exchange.

Commission in the NPRM. For all of the reasons set forth above and in Pikes Peak's Comments in this proceeding, Pikes Peak requests that the Commission dismiss the NPRM in its entirety or, in the alternative, to grant the exchange only as proposed in the NPRM.

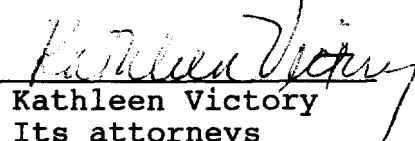
Respectfully submitted,

PIKES PEAK BROADCASTING COMPANY

By


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September 27, 1993

CERTIFICATE OF SERVICE

I, Diane Roper, a secretary in the law offices of Fletcher, Heald & Hildreth, hereby certify that I have on this 27th day of September, 1993, had copies of the foregoing "REPLY COMMENTS" mailed by first class U.S. Mail, postage prepaid, to the following:

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